

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AMERICOAL CORPORATION)	
)	
COMPLAINANT)	CASE NO.
)	90-108
VS.)	
)	
BOONE COUNTY WATER AND SEWER DISTRICT)	
)	
DEFENDANT)	

O R D E R

Americoal Corporation ("Americoal") and Boone County Water and Sewer District ("Boone District") have jointly moved for Commission approval of a settlement agreement and dismissal of this matter. Finding that the Settlement Agreement is contrary to law, the Commission denies the motion.

Americoal is a Kentucky corporation which is developing a 100 lot mobile home project in the Old Lexington Pike Villa Subdivision of Boone County, Kentucky. Boone District, a combined water and sewer district, provides water and sewer service to the project.

Americoal has filed a complaint with the Commission alleging that Boone District is assessing a sewer tap-in fee of \$1,000 per lot. Americoal further alleges that it provides all sewer lines and that Boone District performs no services for the tap-in fee. Boone District admits assessing the fee, but contends that the fee is necessary to recover the installation costs of sewer collector

lines and capacity charges imposed by Sanitation District No. 1 of Campbell and Kenton Counties ("Sanitation District").

On March 14, 1991, Americoal and Boone District jointly submitted a Settlement Agreement and motion to dismiss this matter. Under the terms of the Settlement Agreement, Boone District agrees to pay Americoal's attorneys fees, convey to Americoal a parcel of land of nominal value which adjoins the Old Lexington Pike Villa Development, and to accept the \$46,000 already paid by Americoal as full and complete payment for all past, present, and future sewer connections at the Old Lexington Pike Villa Development. In return, Americoal has agreed to withdraw its complaint.

As a general rule, parties to a Commission proceeding may negotiate a resolution to all disputes. Public policy favors such action. However, any agreement must be lawful and reasonable. This rule was succinctly stated in Utah Dept. of Administrative Services v. Pub. Serv. Comm'n, 658 P.2d 601 (Utah 1983):

The law has no interest in compelling all disputes to be resolved by litigation. International Motor Rebuilding Co. v. United Motor Exchange, Inc., 193 Kan. 497, 499, 393 P.2d 992, 995 (1964); Lomas & Nettleton Co. v. Tiger Enterprises, Inc., 99 Idaho 539, 542, 585 P.2d 949, 952 (1978). One reason public policy favors the settlement of disputes by compromise is that this avoids the delay and the public and private expense of litigation. The policy in favor of settlements applies to controversies before regulatory agencies, so long as the settlement is not contrary to law and the public interest is safeguarded by review and approval by the appropriate public authority.

Id. at 613. (Citations omitted) (footnote omitted). The burden

of showing the lawfulness and reasonableness of any agreement is on the proponent of the agreement.

Based upon its review of the evidence of record, the Commission finds the Settlement Agreement to be unlawful. The Settlement Agreement affirms and ratifies Boone District's prior collection of sewer tap-in fees when the utility's filed rate schedule did not prescribe such fees. KRS 278.160(2)¹ expressly prohibits the collection of fees not contained in filed rate schedules.

The Settlement Agreement also violates judicial prohibitions against retroactive rate-making. See, e.g., Pub. Serv. Comm'n v. Diamond State Telephone, 468 A.2d 1285 (Del. 1983). It effectively establishes a fee for sewer connections made by Americoal since May 1989. As these fees will not become effective until Commission approval of the Agreement is granted, these fees will be for services long since rendered. "Rates applied to past services rendered are retroactive. . ." Re Gulf Power Company, 43 PUR4th 15, 20 (Fla. PSC 1981). Commission approval of the Settlement Agreement would constitute retroactive rate-making.

Assuming arguendo that the Settlement Agreement is lawful, the record does not support a finding that it is reasonable. Boone District describes the sewer tap-in fee as a capacity fee

¹ No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.


whose purpose is the recovery of Sanitation District No. 1's capacity charges and the sewer collector lines' capital cost. The inclusion of depreciation expense in a utility's general rates is the normal method of recovering capital costs and replacing capital plant. See, e.g., Pub. Serv. Comm'n v. Dewitt Water District, Ky., 720 S.W.2d 725 (1986). The record contains no evidence to persuade the Commission that the capacity fee, which allows for a more rapid recovery of capital costs, is reasonable or is needed. Absent such showing, the Commission cannot place its imprimatur upon the Settlement Agreement.

IT IS THEREFORE ORDERED that:

1. The Joint Motion for Dismissal and Approval of Settlement Agreement is denied.
2. The procedural schedule, appended hereto, shall be followed.

Done at Frankfort, Kentucky, this 1st day of July, 1991.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director

APPENDIX

**APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 90-108 DATED 7/01/91**

Any party may serve upon the other a
request for production of documents
and written interrogatories no later than..... 08/02/91

Requests for production of documents and
written interrogatories shall be answered
no later than..... 08/19/91

Any party may take the testimony of any
person by deposition upon oral examination,
pursuant to notice or by agreement,
on or before..... 08/30/91

Each party shall serve upon the other a
written summary of those witnesses whom
it expects to call at formal hearing,
copies of all exhibits to be introduced
at that hearing and all preliminary
motions and objections, except objections
to exhibits, no later than..... 09/15/91

A formal hearing in this matter shall
begin in Hearing Room 1 of the Commission's
offices at 730 Schenkel Lane, Frankfort,
Kentucky at 9:00 a.m., Eastern Daylight
Time, on..... 09/30/91